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Twenty-fifth session

SUMMARY RECORD OF THE 473rd MEETING

Held at Headquarters, New York,
on Thursday, 7 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. Mr. BHALA (United States of America), speaking for his delegation and that of France, proposed that the following sentence should be added at the end of article 17 (1) of the draft Model Law (A/46/17, annex I): "Completion does not otherwise affect the relationship between the beneficiary and the beneficiary's bank". The purpose of that addition was to ensure that completion did not interfere with the relationship between the beneficiary and the beneficiary's bank except as set forth in the second sentence of article 17 (1).

2. Mr. LE GUEN (France) noted that no change was being proposed in article 17 (2). The sponsors had not accepted the suggestion that the phrase "obligation of the originator to the beneficiary" in article 17 (2) should be amended to read "obligation of the originator to pay the beneficiary", apparently in order to satisfy the needs of civil-law countries.

3. Mr. CHATURVEDI (India) said that he was not entirely satisfied with the new text, because it did not cover the case of partial acceptance by a beneficiary's bank of a transfer. Nevertheless, he could agree to the addition.

4. The CHAIRMAN pointed out that the Commission had decided at an earlier meeting, when considering the relationship between article 17 (1) and article 14, which dealt with partial payment, to make no change in article 17 (2) with respect to partial payment.

5. Mr. EL-SHARKAWY (Egypt) said that the additional sentence proposed for article 17 (1) satisfied some of his objections, but still left some problems with respect to article 17 (2). He suggested that the additional sentence should be made a separate paragraph in order to cover cases arising under either paragraph (1) or paragraph (2) of article 17.

6. Mr. CRAWFORD (Canada) said he regretted that article 17 (2) had not been changed to give explicit expression to the implied condition that the beneficiary had selected the beneficiary's bank. If the addition to article 17 (1) was intended to reflect that idea, he thought it should be discussed further; if it was not, he wondered why the idea had been dropped.

7. Mr. GREGORY (United Kingdom) said that he welcomed the addition proposed in article 17 (1), but considered that the problem raised by the representative of Canada at an earlier meeting, concerning article 17 (2), needed to be addressed. Although it had been decided that no change would be made in article 17 (1) to take partial payment into account, something additional was needed in article 17 (2) in order to take it into account there.

8. The CHAIRMAN said that he would ask the Drafting Group to take that point into consideration when it reviewed article 17.

9. Mr. FUJISHITA (Japan) asked the sponsors of the amendment for further clarification of the purpose of the new sentence.

10. Mr. LE GUEN (France) said that the purpose of the additional sentence was to bring article 17 (1) into conformity with article 17 (2), which defined the credit transfer in terms of the whole of the transaction.

11. Mr. DUCHEK (Austria) said that from the point of view of internal consistency, it would be equally logical to add that the internal relationship between the originator and the beneficiary also remained unaffected.

12. The CHAIRMAN said that that point would be dealt with when the Commission considered article 17 (2). He noted that the reasons for regulating the relationship between the originator and the bank had to do with the central compromise underlying the Model Law: the compromise between giving the originator the right of refund without the involvement of foreign legal systems, and the need to give banks the benefit of limited liability as set forth in article 16. The beneficiary was not in the same position; if he had not received the transfer, he retained all the rights accruing to him under the Model Law.

13. Mr. AZZIMANE (Morocco) said that two concepts of credit transfer had been put forward in the Commission earlier in the session, one restrictive and the other broad. It had been his understanding that the purpose of amending article 17 (1) was to strike a compromise between those two concepts. However, the addition proposed by the United States and France did not seem to be a compromise, as it simply adopted the restrictive concept. Although the change proposed did not seem to affect article 17 (1) materially, it might have a greater effect on article 17 (2).

14. Mr. LE GUEN (France) said that his delegation, like Morocco's, had originally been opposed to article 17 (1), but had agreed to it because a majority of the Commission was in favour of it. In view of that situation, it was proposing the addition of the new sentence simply in order to preserve the internal logic of the article.

15. Mr. CHATURVEDI (India) said he supported the Austrian representative's suggestion to the effect that the new sentence should indicate that not only the relationship between the beneficiary and the beneficiary's bank, but the relationship between the beneficiary and the originator remained unaffected.

16. The CHAIRMAN said he took it that article 17 (1), as amended, was adopted.

17. It was so decided.

18. The CHAIRMAN invited the Commission to take up article 17 (2), and asked those who had voiced objections to that article at earlier meetings to restate them.

19. Mr. CRAWFORD (Canada) recalled that he had expressed the view that the rule of discharge stated in article 17 (2) worked fairly only if the beneficiary had designated the account. Other delegations had apparently interpreted the phrase "that can be discharged by credit transfer ..." as preserving the rights of the beneficiary. He wondered whether that interpretation had been recorded in the Commission's records, but was concerned in any case that the reference to "the account indicated by the originator" seemed to invite misinterpretation.

20. Mr. FUJISHITA (Japan) said that he had not been convinced by the arguments for retaining article 17 (2). The article clearly interfered with the relationship between the originator and the beneficiary, which was something the Model Law should not do. Moreover, the paragraph introduced an element of uncertainty through its use of the words "can be". Further, as article 5 dealt with the credit risk or credit exposure of the receiving bank, he saw no reason for not dealing also with the credit risk or exposure of the beneficiary. Other arguments against the retention of article 17 (2) had been put forward eloquently by a number of observers. For those reasons, he could not support article 17 (2).

21. Mr. GREGORY (United Kingdom) said it was true that the words "can be discharged" could be understood as implying prior agreement by the originator. His delegation, however, continued to believe, for all of the reasons he had stated at an earlier meeting, that article 17 (2) should be retained.

22. Mr. AZZIMANE (Morocco) said that he wished neither to approve nor disapprove of article 17 (2), but simply to understand the reason for it. It had often been said that paragraph (2) only marginally affected the underlying obligation, but in fact it dealt fundamentally with the discharge of that very obligation. As the Commission had decided to formulate article 17 (1) so abstractly, he did not understand why article 17 (2) dealt with so concrete and specific an issue.

23. The CHAIRMAN stated that article 17 (2) defined the moment when the underlying obligation was discharged. It was, indeed, the only instance in the Model Law dealing with the underlying obligation. It was necessary to have such a definition, precisely because electronic transfers were so fast and so voluminous. When agreement between the parties, or the Law, stipulated that an electronic transfer of funds amounted to a discharge of an obligation, then there was a need for the moment of discharge to be defined very precisely.

24. Mr. SCHNEIDER (Germany) said that the rule enshrined in article 17 (2) was one of the most important in the entire Model Law, but like the representative of Japan he felt it had no place there. During the course of

(Mr. Schneider, Germany)

its work, the Commission had learned that the situation varied widely from country to country, both as to banking practice and as to legal framework. In some countries, electronic transfers were used for high volumes of funds, in others for much smaller volumes, and in addition banking rules differed from country to country. There was a need for harmonization, indeed there had been many attempts at harmonization, but with the proposed article 17 (2) the Commission appeared to be adding to, not reducing, the confusion. Of the many international conventions in existence, not one had a provision comparable to article 17 (2).

25. The question of the moment of discharge of the obligation had nothing to do with the transfer of funds itself. The Commission had decided to treat electronic transfers in a very abstract way, but with article 17 (2) it was turning away from that decision and dealing with one very specific and very concrete issue.

26. The proposed article 17 (2) enshrined a bad policy, one that would engender problems both for the system and for the consumer. The representative of Canada had said that article 17 (2) allowed some flexibility, by the inclusion of the term "can" in the phrase "an obligation of the originator to the beneficiary that can be discharged by credit transfer". Increasingly, however, credit transfer was the only way for an obligation to be discharged. He cited the example of a person obliged to pay for an insurance policy by credit transfer. If the transfer were not correctly accepted by the insurance company's bank, then under article 17 (2) the person would himself be liable for the loss of insurance coverage.

27. The Commission was seeking to establish consistency with other means of payment, such as cheques or cash, but was in the process of establishing, for electronic funds transfers, widely divergent rules as to when payment actually took place.

28. For all of the reasons he had given, he urged that article 17 (2) should be deleted.

29. Mr. BHALA (United States of America) said that his delegation regarded article 17 (2) as fundamental. Many assertions had been made against the article, but little argument. Whereas the representative of Japan felt that article 17 (2) interfered with the underlying relationship between the originator and the beneficiary, it had to be pointed out that the article did not come into play unless two conditions were met: "if the transfer was for the purpose of discharging an obligation" and if it "can be discharged by credit transfer". "Certainty" and "predictability" were the words he would use for what the representative of Japan dubbed "interference". One of the benefits of a rule on discharge of obligation, as enshrined in article 17 (2), was the avoidance of uncertainty. The representative of Japan felt that the phrase "can be discharged" injected a great deal of uncertainty, but, on the contrary, the stipulation in article 17 (2) of the two conditions which had to be fulfilled before the rule would apply resulted in anything but uncertainty.

(Mr. Bhala, United States)

30. The representative of Germany had drawn analogies with other conventions, pointing out that they did not contain a rule on discharge of obligation, but it had to be remembered that the Commission had always taken the view that credit transfers were a fundamentally different way of making payment. Therefore, analogies were unhelpful.

31. The representative of Japan had stated that since article 5 spoke of the credit exposure of the receiving bank, the Commission should also consider the credit risk of the beneficiary to the beneficiary's bank. The United States took the view that the Model Law was not intended to have any effect on the relationship between the beneficiary and the beneficiary's bank, because that was private.

32. Reference had been made to the eloquent argument put forward by the observer for IMF. Equally eloquent arguments had been made from other points of view, and references to an argument's eloquence did not help the discussion to move forward.

33. The representative of Germany had claimed that the situation with regard to electronic funds transfers differed from country to country, but if the Commission was to be deflected every time it discovered a situation which varied from one country to another, then very little progress towards harmonization would ever have been made. The question of the differing volumes of transfers handled by different countries had no effect on the applicability of the rule on discharge of obligation in article 17 (2), and in any event the Commission had decided not to make a distinction between situations which differed from country to country.

34. The representative of Germany had also claimed that the policy in article 17 (2) would harm the consumer. That was simply not true. The rule in article 17 (2) was a pro-consumer rule, in that it stated clearly to the ultimate users of the system when the obligation was discharged. As to loss of insurance coverage through lateness of acceptance, that problem had already been covered in article 16 (1), which stipulated that in such a case, the receiving bank would have to pay interest. With regard to the assertion that article 17 (2) would lead to problems relative to other conventions, it was not true that the Commission was attempting to harmonize electronic funds transfers with paper transfers.

35. As for the assertion that the Model Law should be abstract, that was a sound principle, but it must not be forgotten that the objective of the Model Law was something very practical. The issue covered in article 17 (2) was not one specific problem; it was the whole purpose of the credit transfer itself.

36. Mr. EL-SHARKAWY (Egypt) said that unlike some other representatives, he felt that the Model Law was the appropriate place to regulate the issue of discharge of obligation arising out of a credit transfer. It was important to determine not only when a credit transfer discharged the obligation of the

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originator with respect to the beneficiary, but also when it discharged the obligation of the beneficiary's bank to the beneficiary. He therefore suggested that the addition to article 17 (1) put forward earlier by the representatives of France and the United States could also be adopted with respect to article 17 (2), either in a newly-drafted paragraph which would combine both article 17 (1) and 17 (2), or in an additional sentence in article 17 (2) stating that the discharge as described in the existing sentences of article 17 (2) did not affect the relationship between the beneficiary and the beneficiary's bank.

37. Mr. SANDOVAL (Chile) said that it was precisely the notion of abstraction which had engendered a high degree of certainty with respect to other payment instruments, such as cheques, and had allowed them to be used for transfers of funds. He felt that that principle of abstraction should be retained in the Model Law by deleting article 17 (2).

38. Mr. DUCHEK (Austria) said that while it had been stated that article 17 (2) did not interfere with the underlying relationship between the originator and the beneficiary, such statements had been unconvincing.

39. The Chairman had said that not to accept the compromise embodied in article 17 (2) would be to undo the drafting work of many years; that was an exaggeration. The formulation of article 17 (2) was in the interests of the banks in the payment chain, but detrimental both to the originator and to the beneficiary.

40. Returning to the example of an individual who lost insurance coverage through late payment of a transfer, he said that the consequent obligation by the receiving bank to pay interest was not the point at all. The rule covered in article 17 (2) should be removed from the Model Law, and left to the discretion of national legislatures. The more the provisions of a model law interfered with rights and obligations, the harder it became to transfer those provisions into national law. He supported the arguments of the representatives of Japan and Canada, found those of the representative of the United States to be unconvincing, and proposed that article 17 (2) should be deleted.

41. The CHAIRMAN said that there had been a misunderstanding. In speaking of undoing the drafting work of many years, he had not been alluding to article 17 (2).

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

42. The CHAIRMAN announced that the delegation of the United States of America had prepared a draft text which might help to resolve the current impasse.

43. Mr. BURMAN (United States of America) proposed that the following text should be added to the current wording of article 17 (2): "Payment under this paragraph is acceptance under article 17 (1) unless applicable law provides for an earlier time of payment". He hoped that the addition would accommodate those national systems which provided for the obligation to be discharged at an earlier time.

44. Mr. LIM (Singapore) supported the deletion of paragraph (2) on the grounds that it interfered with the underlying obligations of the parties concerned. The scope of paragraph (2) was very restrictive and was subject to article 3, concerning variation by agreement between the parties.

45. He wished to know whether the United States proposal contemplated a situation in which an underlying contract between two parties contained provisions that were contrary to the provisions of article 17 (2). Would such provisions be considered a variation of the provisions of article 17 (2) and thereby override them?

46. He suggested that the words "the same amount in cash" in article 17 (2) should be amended to make it clear that they referred to the same amount as stated in the payment order accepted by the beneficiary bank, and not the amount stated in the payment order issued by the originator.

47. Mr. BISCHOFF (Observer for Switzerland) supported the views expressed by the representatives of Austria, Chile, Germany and Japan. Many laws governing the contractual relationship between the originator and the beneficiary contained specific provisions that concerned the subject of article 17 (2). In many legislations, financial obligations must be met by the payment of a sum of money. Modern judicial practice, however, offered many exceptions to that principle, such as where parties agreed to the discharge of an obligation by a credit transfer. Paragraph (2), if retained, would not only call into question the acceptance of the intervention of the Model Law in national legislation, but would also require the reopening of questions on which agreement had already been reached, including the issues of force majeure and revocation of a payment order. While the Model Law itself should not be abstract, it must provide for an abstract concept of transfer.

48. The CHAIRMAN pointed out that whether or not article 17 (2) was retained, the provisions concerning force majeure and revocation of a payment order (art. 11) would not be affected. Paragraph (2) was based on the assumption that the bank had already received the order of payment, and the questions of force majeure and revocation of the order could therefore no longer arise.

49. Mr. KOMAROV (Russian Federation) said that he supported the retention of paragraph (2), whose language provided a degree of certainty as to the time of discharge of an obligation. He did not share the view that the provision interfered with the relationship between the originator and the beneficiary. It merely sought to create a rational link or bridge between the two banks

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which they were free to use or not to use. The provision was worded in a practical way and would not prevent the parties from envisaging other possible times when an obligation would be considered as discharged.

50. Mr. VASSEUR (Observer, Banking Federation of the European Community) supported the position that paragraph (2) should be deleted. Acceptance by the beneficiary bank implied the discharge of the originator's obligation. The civil codes of most European countries contained provisions for the discharge of obligations and, if paragraph (2) were retained, an additional means of discharge of obligations would have to be introduced: when a credit transfer was effected to the beneficiary bank. The draft Model Law was not the vehicle through which to introduce an additional means of discharge of an obligation. Moreover, a transfer might be effected for other purposes, such as making a deposit or gift, and he failed to see why article 17 (2) should provide for only one purpose, namely, the discharge of an obligation. For that reason, he could not support the amendment proposed by the delegation of the United States, which referred only to the case of the discharge of an obligation.

51. Mr. HOLEC (Czechoslovakia), in supporting the deletion of paragraph (2), said that the provision must take into account the varying situations in different countries, since the Model Law would apply notwithstanding the means used for effecting the payment order.

52. The completion of a credit transfer and the discharge of an obligation were separate issues. Discharge of an obligation was a matter best dealt with by the applicable national law and, in his view, the Commission should stress the abstract nature of the payment order.

53. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that his delegation was in favour of deleting article 17 (2).

54. Mr. GREGORY (United Kingdom) said that all the arguments that had been put forward for the deletion of article 17 (2) seemed to be based on the concern that the Commission was interfering with the relationship between the originator and the beneficiary, as governed by national laws. That was, however, not the case. The Commission was not implying that a credit transfer could be used to discharge an obligation. Perhaps it might be advisable to indicate in article 17 (2) that the Law did not address the question of whether or not an obligation could be discharged by a credit transfer.

55. The adoption of the compromise proposal made by the representative of the United States might clarify the matter. The addition of the words "unless applicable law provides for an earlier time of payment" would allow national legislation to provide for an earlier time of payment.

56. Mr. JANSSON (Observer for Sweden) said that, in the light of the amendment proposed by the representative of Canada, his delegation could support the retention of article 17 (2).

57. Mr. MOORE (Nigeria) said that his delegation was also in favour of retaining article 17 (2).

58. Mr. FELSENFELD (United States of America) said that his delegation supported article 17 (2) because it was the only place in the Model Law that explained what the Law actually did. If article 17 (2) was deleted, the Model Law would deal only with abstractions and would not specify what international electronic transfers of funds should accomplish.

59. Mr. CHATURVEDI (India) inquired whether the United States proposal to amend article 17 (2) involved only the addition of the words "unless applicable law provides for an earlier time of payment" or whether the proposal also entailed other amendments.

60. Mr. BURMAN (United States of America) said that the proposal involved only an addition to the existing text of article 17 (2). While his delegation believed that the Model Law would perform its task better without the addition, it was willing to accept a modification in order to allay the concerns of some delegations.

61. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the United States proposal gave rise to some difficulty. It was quite probable that the law applicable to the underlying transaction was the same as the law applicable to payment. If a country that had adopted the Model Law had a national law that provided for an earlier time of payment than did the Model Law, he wished to know how a court would be able to determine the exact time discharge had occurred. It was necessary to specify what law was at issue and not refer simply to the "applicable law".

62. Mr. BHALA (United States of America) said that, in the situation described by the observer for the Hague Conference, the court would consider both the national law and the Model Law, and would apply the law that provided for the earlier time of discharge of payment.

The meeting rose at 1 p.m.